

ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

GN Docket No. 93-252

In the Matter of)
)
Implementation of Sections 3(n) and 332)
of the Communications Act)
)
Regulatory Treatment of Mobile Services)

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COMMENTS OF COMCAST CORPORATION

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SUMMARY

Comcast Corporation ("Comcast") opposes the application of a uniform spectrum aggregation limit to all Commercial Mobile Radio Services ("CMRS"). The Federal Communications Commission's ("Commission") attempt to apply a uniform spectrum cap to all CMRS providers is based upon the unexamined and unsupported assumption that all CMRS providers pose similar and significant anti-competitive risks when they hold more than 40 MHz of spectrum in a given service area. No factual predicate exists in support of this view, particularly in light of the fundamental differences which exist among the various types of CMRS providers in regard to (1) the technical capabilities of the spectrum used; (2) the nature of services offered; and (3) the geographic areas served.

In addition, the Commission's assumptions regarding the CMRS marketplace, and its anticipated development, do not accurately reflect the varied nature of CMRS service. No spectrum cap should be applied by the Commission without a factually-based determination of the market power which various CMRS providers may wield upon their aggregation of various spectrum. Many of the CMRS providers that would be subject to the proposed spectrum cap are not in a position to exercise undue power in their service areas, regardless of the amount of spectrum they hold.

An across-the-board spectrum aggregation limit also will stifle competition and innovation in the telecommunications marketplace by denying potential market entrants the flexibility to provide distinct, targeted services. If new CMRS entrants and emerging CMRS service providers are to provide competition to

the telephone local loop, as ultimately envisioned by the Commission, the rules must provide flexibility for CMRS providers to offer a full range of telecommunications services. A uniform spectrum cap disproportionately disadvantages all non-LEC CMRS providers who are prevented from aggregating spectrum to compete effectively.

Finally, if the Commission's goal is to achieve competition and diversity in the wireless marketplace, these goals be achieved by other less disruptive means. For instance, by establishing strict interlocking directorship rules to reduce the likelihood of anti-competitive behavior, the Commission could promote diversity without threatening the competitive development of the CMRS marketplace.

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COMMENTS OF COMCAST CORPORATION

Comcast Corporation ("Comcast") hereby submits, by its attorneys, its comments in response to the Federal Communications Commission's (the "Commission") Further Notice of Proposed Rulemaking regarding additional modifications to existing mobile services rules.^{1/} The Further Notice seeks to implement the new administrative regime envisioned by Congress that provides for symmetry in the regulatory treatment of all spectrum-based mobile services.

Although the Further Notice broadly addresses specific technical, operational and licensing rules for commercial mobile services, Comcast limits its comments to one issue: the Commission's proposed establishment of a general 40 MHz Commercial Mobile Radio Services ("CMRS") spectrum aggregation limit. The adoption of a uniform spectrum cap that applies to all CMRS providers -- with no consideration of the type of services offered, the relevant product market, the technological characteristics of the providers and the spectrum used, and the actual

^{1/} See Further Notice of Proposed Rulemaking, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, FCC 94-100 (released May 20, 1994) (hereafter "Further Notice").

ability of CMRS providers to leverage market power -- is without merit and will have a significant detrimental impact on the growth and competitiveness of the future wireless marketplace. Accordingly, Comcast opposes the establishment of a uniform spectrum aggregation limit at this time and requests that the Commission address the issue only after the CMRS marketplace evolves to a point where these important issues can be analyzed thoroughly.

I. THE FACTUAL PREDICATE FOR ADOPTION OF A GENERAL CMRS SPECTRUM AGGREGATION LIMIT DOES NOT EXIST.

The Commission's attempt to apply a uniform spectrum aggregation limit to all CMRS providers appears to be based upon the unexamined and unsupported assumption that all CMRS providers pose similar and significant anti-competitive risks when they hold more than 40 MHz of spectrum in any given service area.^{2/} No factual predicate exists in support of this view, particularly in light of the fundamental differences among the various types of CMRS providers in regard to (1) the technical capabilities of the spectrum used; (2) the nature of services offered; and (3) the geographic areas served. Moreover, no spectrum cap should be applied by the Commission without a factually-based determination of the market power which various CMRS providers may wield upon their aggregation of various spectrum.

^{2/} Given the current spectrum available for CMRS, and the Commission's decision to impose a PCS-cellular eligibility restriction, the only parties hindered by this proposal are the holders of non-cellular CMRS spectrum. Therefore, the need for and potential effect of this proposal must be reviewed with an eye sharply focused upon those non-cellular wireless providers who wish to participate in the telecommunications marketplace.

A. Significant Differences Between CMRS Providers,
The Spectrum They Occupy And The Geographic
Areas They Serve Preclude The Enforcement Of A
General Spectrum Cap.

In proposing to adopt a 40 MHz spectrum cap for all CMRS providers, regardless of the services they provide or the spectrum they occupy, the Commission overlooks significant differences among CMRS providers. These differences make the establishment of a general spectrum cap impractical and ill-advised. Specifically, the varied technical capabilities of CMRS spectrum, the diverse range of services offered on CMRS frequencies, and the distinct service areas defined for each CMRS service illustrate that the establishment of a uniform spectrum aggregation limit would be inappropriate, particularly if the Commission seeks to promote competition and innovation in the telecommunications marketplace.

1. All CMRS spectrum is not the same and cannot rationally be reviewed under the Further Notice's operative assumptions.

The Further Notice proceeds under the unsupported notion that the 40 MHz aggregation limit adopted for PCS is the talisman for all CMRS. However, the 40 MHz broadband PCS spectrum aggregation limit was established based upon a thorough review of the PCS marketplace and its particular technical characteristics and proposed service offerings. Specifically, the Commission focused on (1) the amount of spectrum available in a single band to be allocated among discrete spectrum blocks; (2) incumbent microwave congestion in band; and (3) relative parity with clear cellular spectrum. This review was conducted notwithstanding that all PCS spectrum shared the same general technical characteristics. Moreover, and in further

acknowledgement of the disparate nature of spectrum separated by 200 MHz, the Commission just reallocated all PCS spectrum blocks to at the lower band (1850-1990 MHz) in order to better ensure robust competition among PCS licensees.

Unlike the lower band of broadband PCS spectrum recently allocated, the telecommunications uses and propagation characteristics of the other various CMRS spectrum blocks vary considerably. The spectral requirements of common carrier paging, for example, are not the same as that of broadband PCS. A spectrum cap that treats all mobile services the same ignores the basic fact that the needs of CMRS providers are service and spectrum specific.

Furthermore, spectrum licensed on a non-contiguous channel-by-channel basis, such as SMR spectrum, is distinct from spectrum licensed in contiguous blocks, and will not necessarily be capable of supporting similar services. Co-channel interference coordination in these services differs considerably and affects the types of services that can be made available. Applying a uniform spectrum cap will disproportionately affect particular non-cellular CMRS providers, thereby hindering both technological development and the growth of competition.

2. All CMRS services are not competitive with each other and will not be in the future.

To support the notion of a uniform spectrum cap, the Further Notice assumes that all CMRS providers will be offering interchangeable services. In the Second Report and Order, however, the Commission recognized that the record did

not support treating all CMRS services as part of a single competitive market.^{3/}

The Further Notice does not explain the Commission's departure from this recent conclusion in proposing a uniform spectrum cap.

The services offered on the spectrum allocations for broadband PCS, SMR, cellular, as well as the transitioned PMRS and advanced paging common carriers, differ significantly. Various CMRS providers do not offer customers the same telecommunications capabilities and, therefore, the spectrum they occupy should not be aggregated into a single product group. Accordingly, the relevant product market for CMRS should not be so broadly defined as to incorporate all spectrum-based mobile services.

Such a rule is also contrary to the Commission's goal of establishing administrative symmetry in the regulation of CMRS. Pursuant to Congress' direction, and in this very proceeding, the Commission is devising a regulatory framework that treats "like" services in the same manner, but may classify CMRS providers in different groups if classifications are proper.^{4/} Thus, the particular needs and characteristics of specific spectrum can be accommodated, and services which offer similar capabilities can be regulated uniformly. The Commission's "one size fits all" spectrum aggregation cap, however, undermines this effort by subjecting dissimilar

3/ See Second Report and Order, Regulatory Treatment of Mobile Services, 9 FCC Rcd 1411 (1994) (hereafter "Second Report and Order").

4/ For example, the Commission has already suggested treating small CMRS operators differently from other CMRS operators.

services to identical regulation. The proposed rule ignores the diverse nature of CMRS and the distinct needs of individual CMRS providers.

3. A general spectrum cap cannot rationally be implemented in light of the different service area definitions established for CMRS.

It is impractical, if not impossible, to enforce a uniform spectrum cap when different geographic service areas are defined for different CMRS services. As recognized in the Further Notice, CMRS services are not licensed in standardized geographic areas; thus, any general rule that limits spectrum held in one defined area, e.g. BTAs, could not be translated into a comparable limit in another, e.g. RSAs. A uniform spectrum cap would create an administrative nightmare for service providers that are licensed for service areas that differ from that defined in a general spectrum cap rule. For example, SMR providers create their service areas by calculating radial distances from a predetermined center point. The resulting self-designated service areas are dwarfed by the standard area BTA, even in comparison to the coverages of those operators making wide area filings. Is the Commission truly prepared to view those carriers in the same fashion as they do cellular carriers? A uniform spectrum aggregation cap, although extolled in the name of parity, will only cement second class status for non-cellular CMRS providers.

Similar burdens are not created by the PCS aggregation limit because the limit applies only to the relevant standardized PCS service areas. Thus, auction participants can formulate their business plans in advance of the auctions to utilize efficiently the spectrum they intend to hold. In contrast, a uniform CMRS spectrum

aggregation limit will disrupt the current operations of non-cellular CMRS providers, and force those providers to divest portions of their spectrum holdings. The costs of divestiture cannot be compared with a decision not to participate in the auctioning of PCS spectrum in a particular market.

It would be almost impossible to divest only portions of spectrum in parts of markets without destroying the basic spectrum efficiency that dictated the aggregation of spectrum initially. Moreover, service providers striving to comply with a spectrum cap rule would be forced to undertake complicated and costly analyses to determine the permissible level of ownership at any given point in time in a particular portion of a service area. The Further Notice overlooks entirely the practical problems inherent in a partial "divestiture" of spectrum.^{5/}

B. All CMRS Providers Do Not Pose Identical Anti-Competitive Risks In The Provision Of Their Distinct Services.

The Further Notice's assumptions of the competitiveness of the CMRS marketplace, and its anticipated development, do not accurately reflect the varied nature of CMRS service. As envisioned by the Budget Act,^{6/} and reflected in its legislative history, the CMRS marketplace encompasses a wide range of services which cannot be classified as a single product market. Once PCS is licensed and its

^{5/} The Further Notice assumes, without analysis, that there is a ready market for divested spectrum.

^{6/} See Communications Act of 1934 (as revised by the Budget Act) § 332(c)(1); H.R. Conf. Rep. No. 103-213, P.L. 103-66, 103 Cong., 1st Sess. (1993), reprinted in 1993 U.S.C.C.A.N., 1180.

services operational, an even wider variety of mobile services may emerge.

Accordingly, not all CMRS providers will have the ability to leverage "market power" to the detriment of their competitors -- the evil sought to be addressed by the Commission's uniform spectrum cap rule.

In anticipation of a diverse CMRS marketplace, Congress provided the Commission with discretion to regulate CMRS providers based upon the services they provide and the market positions they hold.^{7/} A uniform spectrum cap, however, disregards this authority, treating all CMRS providers as identical, with no market analysis or determination of actual market power.

Many of the CMRS providers that would be subject to the proposed spectrum cap are not in a position to exercise undue market power in their service areas, regardless of the amount of spectrum they hold. Moreover, as PCS is not yet auctioned or in operation, it is neither possible nor wise to make rules based on predictions of its impact on mobile markets. In addition, the identity of the licensees, as well as their actual services, are important in making a spectrum aggregation limit determination. Without a clear picture of the opportunities for anti-competitive behavior, the Commission runs the risk of creating market inequities that will hinder the entry of new service providers and prevent the development of competition in the local loop.

^{7/} *Id.* ("market conditions may justify differences in the regulatory treatment of some providers of commercial mobile services"). The Budget Act expressly provides the Commission with flexibility to classify CMRS providers and to subject difference classes to different regulation.

In the Commission's earlier Order regarding Title II forbearance for CMRS providers, the Commission made the basic determination that all CMRS providers, with the exception of cellular licensees, currently lack market power. The Commission also determined that it would promptly conduct a further proceeding to analyze cellular market power.^{8/} Thus, no basis exists for the Commission, in the present context, to assume that all CMRS providers that hold a given amount of spectrum will be able to dominate the markets in which they provide service. In fact, the record reflects the opposite -- that the CMRS marketplace is likely to include a variety of service providers that may never hold market power or be able to engage in anti-competitive behavior.^{9/}

Specialized Mobile Radio service providers, for example, who are enhancing their systems to provide digital communications services in non-contiguous markets cannot be deemed comparable in size, scope, or market power to cellular operators, and particularly not those affiliated with dominant landline carriers. At best, some SMR providers will offer niche services that will never compete directly with PCS or cellular service offerings. Subjecting SMR providers and cellular carriers, therefore, to a uniform spectrum cap only will ensure that landline-affiliated

^{8/} See Second Report and Order, Regulatory Treatment of Mobile Services, 9 FCC Rcd at 1478, 1484-85.

^{9/} Unfortunately, the Commission appears more interested in limiting the spectrum available to non-cellular CMRS providers than in addressing the incongruity of a telecommunications marketplace in which one entity can control vast continuous local bottleneck facilities, overlapping set-aside cellular spectrum, PCS spectrum and potential in-market long-distance facilities.

cellular carriers retain their current dominant position in the telecommunications marketplace, and will strip emerging CMRS providers of any ability to compete efficiently and effectively. Based on the record in this proceeding, the Commission cannot rationally treat new CMRS entrants and all cellular carriers in the same manner by applying a uniform spectrum cap to all market participants for the simple reason that they are not similarly situated.

Given that the entire telecommunications industry is facing a revolution in digital technological capabilities, it is premature to treat all CMRS providers as competitive with each other, or as potential competitive threats.^{10/} The Commission has already expressed its intention to review the level of competition in the CMRS marketplace. It would be prudent to delay consideration of a uniform spectrum cap, at least until the level of competitiveness existing in the CMRS marketplace and any potential for anti-competitive behavior can be definitively adduced.

Finally, the Commission has already recognized that there are benefits to diversification in regard to the provision of both broadband and narrowband PCS services.^{11/} In the Further Notice, for instance, the Commission suggested that any

^{10/} The Commission assumes that holding 40 MHz of spectrum constitutes excessive market power without any factual determination or support. Such a finding, at this time, is premature in light of the Commission's future examination of the competitiveness of the cellular marketplace. In addition, it is important to recognize that an analysis of the past history of the CMRS marketplace will not necessarily be useful in predicting its future competitiveness.

^{11/} See Further Notice at para. 93.

general spectrum cap may need to be "adjusted upward slightly" to permit PCS providers the ability to provide both broadband and narrowband PCS services. Such specific attention must be given to each CMRS service, regardless of the type of service offered, when considering the imposition of a spectrum cap.

II. AN ACROSS-THE-BOARD SPECTRUM CAP WILL STIFLE COMPETITION AND INNOVATION BY DENYING POTENTIAL MARKET ENTRANTS THE FLEXIBILITY TO PROVIDE DISTINCT, TARGETED SERVICES.

As proposed, a uniform 40 MHz spectrum cap will hinder the development of competition in the CMRS marketplace and foreclose terrestrial wireless providers from offering a full range of radio and wired technologies and the services they support. Application of a uniform spectrum cap does not account for the business realities facing CMRS providers nor does it reflect the true nature of the developing CMRS and broader telecommunications marketplace.

If new CMRS entrants and emerging CMRS services providers are to provide competition to the telephone local loop, as ultimately envisioned by the Commission, the rules must provide flexibility for CMRS providers to offer a full range of telecommunications services. Without the opportunity to accommodate a full range of communications needs, emerging CMRS providers will find themselves unable to compete with the Local Exchange Carriers ("LECs") who already dominate the provision of services in the intraexchange market.^{12/} All non-LEC CMRS

^{12/} LECs already have regional presence in both the provision of landline and wireless services, as well as control of numbering resources and other evidence of (continued...)

providers are disadvantaged by a uniform spectrum limit to the extent that the rule prevents the aggregation of spectrum necessary to compete. Comcast submits there is a certain illogic to the Commission's spectrum cap proposal if the Commission seeks to encourage facilities-based local services competition.

III. IF THE GOAL IN ADOPTING A CAP IS TO ACHIEVE COMPETITION AND DIVERSITY, THESE GOALS CAN BE REALIZED BY OTHER LESS DISRUPTIVE MEANS.

The Further Notice fails to articulate a purpose for the establishment of a uniform spectrum aggregation limit. If the Commission's goals, however, are diversity and competition in the wireless telecommunications marketplace, they may be achieved by other less disruptive means. For instance, the Commission could establish strict interlocking directorship rules to reduce the likelihood of anti-competitive behavior and to prevent the undue concentration of spectrum. This would promote diversity without threatening the competitive development of the CMRS marketplace.

Moreover, if spectrum caps are determined to be in the public interest, the Commission should consider them only in the context of particular services or where a specific concentration of spectrum gives rise to valid competition/diversity

12/ (...continued)

true market power. In order to compete, new CMRS providers may need additional spectrum to become full service competitors. In the larger telecommunications marketplace, emerging service providers will be hindered by a general CMRS spectrum cap.

concerns.^{13/} Only then can the Commission give proper attention to the unique characteristics of each CMRS service and define a regulatory framework that promotes competition.

IV. CONCLUSION

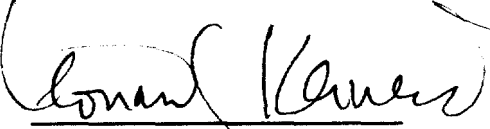
The adoption of a uniform spectrum cap that applies to all CMRS providers, with no consideration of the types of services offered, the relevant product market, the technological characteristics of the spectrum used, and the actual ability of CMRS providers to leverage market power, is without merit and will have a significant detrimental impact on the growth and competitiveness of the future

^{13/} The Commission has already examined the PCS market and adopted a specific PCS spectrum cap. Comcast submits that spectrum caps should only be considered in service specific examinations. Moreover, the history of mobile spectrum allocations strongly suggests that any spectrum cap or allocation limit will be revisited as mobile services demand and market conditions change. Accordingly, a general CMRS spectrum cap is unlikely to stand the test of time.

wireless marketplace. Accordingly, Comcast opposes the Commission's attempt to apply an across-the-board spectrum aggregation limit to all CMRS providers.

Respectfully submitted,

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